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Building effective, accountable and inclusive institutions at all levels: nature and challenges of misconduct and corruption in the public sector, and ways forward

The question of the protection of whistle-blowers

Note by the Secretariat

The Secretariat has the honour to transmit to the Committee of Experts on Public Administration for its review and action, as appropriate, the paper prepared by Committee member Linus Toussaint Mendjana.

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Summary

Corruption is a universal scourge that affects almost all the 193 States Members of the United Nations and is one of the obstacles to the achievement of the Sustainable Development Goals.

Combating this phenomenon requires, inter alia, implementation and strict monitoring of whistle-blowing systems. This note describes some features of these systems and, in view of their importance, recommends that the Committee support their implementation by Member States.

Accordingly, the author recommends the exchange of good practices among Member States in the area of corruption prevention, including with regard to whistle-blowing systems and procedures.

I. Introduction

1. The implementation and monitoring of good governance and ethics in public administrations remain essential, given the widespread nature of corruption in the world in general, and in certain countries in particular. Governance can be a controversial concept, as it is defined and understood in different and sometimes contradictory ways. It refers to the implementation of a set of measures (rules, standards, procedures, conventions, contracts, etc.) with the aim of enhancing coordination among the stakeholders of an organization, each of which holds a degree of power, in order to support consensual decision-making.

2. Corruption affects all peoples and almost all the 193 States Members of the United Nations, in different ways and to varying degrees depending on the State. It refers to the perversion or manipulation of a process or interaction with one or more persons to gain advantages or specific privileges, in the case of the corrupter, or to obtain compensation in exchange for cooperation, in the case of the corrupted.

3. For example, of the 176 countries in the 2016 Corruption Perceptions Index, 69 per cent received a score below 50 on a scale from 0 (highly corrupt) to 100 (very clean). This demonstrates the significance and pervasiveness of corruption in the public sector worldwide.

4. This paper calls for the implementation of one of a wide range of anti-corruption tools, namely whistle-blowing systems. Its purpose is to facilitate understanding of and compliance with these systems, which seem to be neglected not only as a result of inconsistent or otherwise inadequate initial implementation efforts, but above all because they are misunderstood owing to their complexity.

5. The Committee of Experts on Public Administration has addressed the issue of corruption before. At its previous sessions, it strongly condemned the major impact of this scourge on the achievement of the Sustainable Development Goals, which represent a global call to action to eradicate poverty, protect the planet and ensure that all people live in peace and prosperity.

6. Combating corruption is thus indispensable to the pursuit of sustainable development. Consequently, in achieving the Sustainable Development Goals, Governments must give the highest priority to fostering individuals' trust in government integrity.

7. The adoption of measures to prevent and eradicate corruption in the public sector and definitively end impunity by strengthening transparency and promoting collaboration among parliamentarians, civil society, the private sector and public administration must be accelerated.

8. In order to achieve this goal, the analysis that follows presents the concept of the whistle-blower and addresses the associated practical implications, risks and limitations. Lastly, it sets out recommendations aimed at improving corruption prevention and whistle-blowing systems and strengthening the links between these systems and the Sustainable Development Goals.

II. The concept of the whistle-blower

9. A whistle-blower is any individual, group or institution that, upon becoming aware of a threat, risk or scandal, raises the alarm, thereby occasioning a process of regulation, contentious debate or mobilization. Whistle-blowers can be organizations

established for that purpose or citizens who, in connection with their work, report illegal, illicit or dangerous acts that affect the public interest and persons or bodies in positions of power. For example, in France, Act No. 2016-1691 of 9 December 2016 on transparency, anti-corruption measures and the modernization of economic life sets out the definition of a whistle-blower and the procedure for obtaining protection from criminal penalties or retaliation by an employer. The offence (a serious threat to the public interest, a crime, etc.) must first be reported internally and then to the authorities. The public may be informed only as a measure of last resort. In addition, information subject to military or medical confidentiality or to legal professional privilege must not be disclosed.

10. The concept of the *lanceur d'alerte* (whistle-blower) appeared in France in the late 1990s in a sociological study entitled *Les sombres précurseurs: une sociologie pragmatique de l'alerte et du risque*, by Francis Chateauraynaud et Didier Torny, and was popularized in 2000 by the researcher André Cicolella, a whistle-blower himself, in his interactions with the public, journalists and civil society activists. The term *lanceur d'alerte* entered public discourse at that time as a concept distinct from that of the *dénonciateur* (a person who reports information in good faith) and the *délateur* (a person who discloses information for personal gain). However, with the rising number of related cases and scandals, from the Mediator case in France to the Luxembourg Leaks case to the information disclosed by Edward Snowden, the terms and ideas that these concepts represent have tended to become conflated in public discourse.

11. Whistle-blowing systems have clear benefits for the prevention and eradication of corruption.

12. The most frequently cited indicators of corruption focus on describing the issue at the national level. Such indicators can be useful for raising awareness and encouraging Governments to take action. However, their value is limited when it comes to taking measures to combat corruption.

13. This is partly because some corruption risks tend to be specific to certain sectors. For example, corruption poses a significant risk in the health sector owing to the potential for undue influence from pharmaceutical companies that provide financial support to medical research units. In the water sector, clients may have to pay bribes to gain access to a water connection or for repairs.

14. Given that general corruption indicators lack the granularity required to reveal sector-specific exposures, we need to develop tailored indicators to monitor risks and ensure that corruption does not undermine the effectiveness of investments. Accordingly, legislative, regulatory and legal measures establishing the protection of whistle-blowers as a central institution of good governance must be enacted as a matter of priority. In that regard, the Committee has previously noted that it is impossible, without regulations on the protection of whistle-blowers, to attain the confidence of citizens, foster the integrity of civil servants and organize an apparatus of good governance aimed at combating corruption.

15. To ensure good governance, it is also important to foster an atmosphere of trust, which has two dimensions, a public dimension whereby citizens assess government, its institutions and leaders with regard to their moral probity and ethics, and a social dimension related to the attitudes of citizens towards one another.

16. The protection of whistle-blowers remains of undeniable importance in that regard. Article 33 of the United Nations Convention against Corruption, relating to the protection of reporting persons, provides that "Each State Party shall consider

incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."

17. Examples of relevant French legislation include Organic Act No. 2016-1690 of 9 December 2016 on the competence of the Ombudsman in the referral and protection of whistle-blowers, which provides that the Ombudsman is responsible for "referring to the competent authorities any person reporting wrongdoing in accordance with the law and for safeguarding that person's rights and freedoms"; and Act No. 2016-1691 of 9 December 2016, mentioned above, which specifies the conditions under which the Ombudsman operates.

18. The implementation of article 33 of the United Nations Convention against Corruption requires an inclusive approach, as described in article 13 of the Convention, in which States Parties are encouraged to ensure the effective participation of society in anti-corruption efforts by taking appropriate measures, in accordance with fundamental principles of their domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society and non-governmental organizations, in the prevention of and the fight against corruption.

19. In order for anti-corruption structures and bodies to operate effectively, public services must be organized in a manner conducive to the establishment of anti-corruption measures. Anti-corruption efforts must therefore begin with the structural and institutional reorganization of public services to enable the development of whistle-blowing systems.

20. Cameroon, for example, has a wide range of bodies and an organizational and functional framework of services to combat corruption, including:

(a) The Audit Chamber of the Supreme Court;

(b) The National Anti-Corruption Commission;

(c) The National Financial Intelligence Agency;

(d) Ministerial anti-corruption units and public anti-corruption mechanisms;

(e) Parliamentary oversight of the Government;

(f) The (revised) Criminal Code and Code of Criminal Procedure;

(g) The international treaties and conventions ratified by the Government.

21. In Europe, there are bodies such as:

(a) The Group of States against Corruption;

(b) The European Court of Auditors;

(c) The European Anti-fraud Office.

III. Whistle-blowing in practice: implications, risks and limitations

22. The risks associated with whistle-blowing systems relate to retaliation. Even when the reported information is deemed to be based on fact, whistle-blowers may be subjected to, inter alia, unfair dismissal, harassment, discrimination or physical harm.

23. Thus, as noted above, whistle-blowers must be protected by laws and regulations that are applied impartially and without conditions. Likewise, a well-designed protection and security system must be developed and implemented.

24. Most of the time, those who report information, the majority of whom are not motivated by personal gain, are vulnerable, owing to a lack of relevant legislation, procedures and known contact persons.

25. In addition to the risk of retaliation, witnesses, victims or other individuals may exploit the system by disclosing information for purposes of personal gain or defamation or to settle scores, if safeguards are not provided in law. The legal frameworks for the handling of reports are incomplete and, in some cases, non-existent.

26. Thus, whistle-blowing systems should be clearly explained and publicized so that all citizens are aware of the potential criminal penalties they face. An effective system comprises the following features:

(a) A single law providing for security procedures and channels related to whistle-blowing (only 12 countries worldwide, including Ireland, Japan, Serbia and the United Kingdom of Great Britain and Northern Ireland have such a law, which is the only effective mechanism for ensuring the protection of whistle-blowers);

(b) An independent national agency or institution responsible for handling reports;

(c) Guaranteed confidentiality and anonymity;

(d) Criminal penalties for retaliation and false reporting.

27. Steps must therefore be taken to:

(a) Establish the principles of a pluralistic and ethical public service (including by ensuring transparency with regard to conflicts of interest);

(b) Address the shortcomings of existing mechanisms or establish appropriate mechanisms, while ensuring that reports are handled effectively;

(c) Recognize and value the expertise of citizens (develop a transparent and secure framework for reporting information, determining admissibility criteria and establishing the bodies responsible for managing cases).

IV. Conclusion

28. Good governance is considered fundamental to the achievement of the Sustainable Development Goals, including Goal 16, in which governance is a central theme. At the seventeenth session of the Committee, the members will once again have the opportunity to underscore the critical role of Governments, public institutions and public officials in achieving the Goals.

29. The Committee, whose mandate does not include issuing orders, should respectfully bring to the attention of the Economic and Social Council the need to implement effective whistle-blowing systems as a means of combating corruption. Accordingly, the Committee may wish to recommend the exchange of good practices among Member States in the area of corruption prevention, including with regard to whistle-blowing systems and procedures.

30. The Committee may also wish to reaffirm the importance of fostering peoples' trust in their leaders, which requires relentlessly combating corruption and establishing a public service based on meritocracy and bolstered by strong local governments and a commitment to the implementation of additional tools such as whistle-blowing systems.

31. A broader range of anti-corruption tools is required to achieve Sustainable Development Goal 16, in which governance is a central theme, and to enact the public service reform sought by the Committee. The author therefore suggests that the incorporation of whistle-blowing systems into domestic legal frameworks should start in least developed countries, in particular African countries perceived as having the highest levels of corruption.